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In The

Supreme Court of the United States

October Term, 1979

No. 79-1485

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

vs.

LAURA DUNBAR, et al., MARY WOOD, et al., BERNICE JOHNSON, et al., and THARON RAWSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondents, Laura Dunbar, et al., Mary Wood, et al., Bernice Johnson, et al., and Tharon Rawson, et al., oppose the Petitioner's request for Writ of Certiorari to the Supreme Court of the State of Idaho, and file Brief setting out their reasons for so opposing.

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STATEMENT OF THE CASE

Four widows of miners killed in Idaho's Sunshine Mine tragedy of May 2, 1972, brought action in the District Court for Shoshone County, Idaho, claiming the wrongful death of their husbands, and their right to recover against the Petitioners under § 5-311, Idaho Code. The Code section provides:

"5-311. *Action For Wrongful Death*—When a death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The deceased miners were members of the Petitioner Union, and their claim against the Union was stated in this language:

"The defendant, United Steelworkers of America, undertook to act as accident prevention representative and enforcer of the Company-Union agreement and did it negligently, to-wit: (A) It misrepresented its safety concern and expertise to the rank and file. (B) It failed to develop adequate program(s) for its Union representatives. (C) It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to-wit: (1) It failed to require mine evacuation on first evidence of smoke underground; (2) It failed to require fire drills; (3) It failed to require personal protective equipment; (4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground; (5) It failed to require adequate emergency egress from the mine. Each of the aforesaid acts of negligence was jointly and severally a proximate cause of plaintiffs' decedents untimely death."[1]

The Idaho trial court, upon the Union's motion for summary judgment, concluded that the preemption doc-

[1]Idaho Clerk's Record, Rawson, pp. 9-10.

trine applied, and that the Plaintiffs' claims could not be entertained in the Idaho courts.

THE RULING BELOW

The Idaho Supreme Court disagreed. In *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P. 2d 21 (1979), Justice Shepard, writing for at least four of five members of the Court, reasoned that there was state court jurisdiction. This language in the Opinion perhaps best summarizes the Court's ruling on the basic jurisdictional issue:

". . . We believe that even assuming the claims of plaintiffs-appellants fall within the general scope of the doctrine of preemption, nevertheless we deem it clear that the case also falls within the narrow exceptions to that same preemption doctrine which were described in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977)." 602 P. 2d at p. 24.

Germane to the assertion of possible conflict with federal labor law, the Idaho Court concluded that the Plaintiffs' claims did not necessarily exclusively rest upon the Union's duty of fair representation. This was the language of the Court:

"Plaintiffs-appellants' claims are not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by Union to its members." 602 P. 2d at p. 24.

Also:

"We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by a state law which

> requires a person, corporation or an unincorporated association, to refrain from engaging in wrongful conduct which results in death or injury to person or property." 602 P. 2d at p. 25.

In summary:

> "If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member." 602 P. 2d at pp. 25-26.

The Court distinguished *Bryant v. United Mineworkers*, 467 F. 2d 1 (6th Cir. 1972), *cert. denied*, 410 U. S. 930, 93 S. Ct. 1370, 37 L. Ed. 592 (1973), with this ruling:

> "We hold that a material issue remains in existence in the case at bar regarding whether or not the Union had a duty to inspect and the alleged breach of duty. In the case at bar that question was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. This case, therefore, is clearly distinguishable from *Bryant*." 602 P. 2d at p. 26.

The Idaho Court saw claims in this case totally distinct from those claims with which the National Labor Relations Board concerns itself. The Court reasoned:

> "We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts. We are cited to no authority which would permit the National Labor Relations Board to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes." 602 P. 2d at p. 26.

Finally, against the assertion of the doctrine of preemption in general terms, the Court ruled:

> "As noted in *Farmer*, exemptions or exceptions to the preemption doctrine should reflect an inquiry into the nature of the federal and state interest in regulation and the potential for interference with federal regulation or whether the potential for conflict with the federal scheme is 'tangential and remote.' Here, the federal interest is tangential at best. And we see no possibility that the federal labor laws will be thwarted by requiring the Union to answer in state court to the claim that it wrongfully caused the death of these survivors' decedents." 602 P. 2d at pp. 26-27.

In a special concurring opinion, apparently reflecting the opinion of three judges, two of whom had joined in the majority opinion, Justice Bakes of the Idaho Court reasoned:

> "An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy." 602 P. 2d at pp. 44-45.

Justice Bakes qualified his concurring opinion in the sense that he suggested that the precise nature of the claim, and indeed whether a claim would lie against the Union irrespective of preemption arguments, had not been decided. His apparent suggestion was that, while he

found no conflict with federal labor law in state court adjudication of a wrongful death claim, a determination of preemption at the summary judgment stage was premature under the facts and circumstances of this case. 602 P. 2d at pp. 44-45.

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REBUTTAL· PETITIONER'S ARGUMENTS

Contrary to the Petitioner's contention, it cannot be seen where the Idaho Supreme Court determined this case in "a manner inconsistent with the principles established by this Court's decisions in *Vaca v. Sipes,* 386 U. S. 171, 188-195 (1967), and *Humphrey v. Moore,* 375 U. S. 335 (1964)."

(1) Vaca:

In *Vaca,* supra, the plaintiff's claim was that the defendant union had refused to properly process his discharge grievance to arbitration through the bargaining agreement procedure. p. 173. This court concluded that the state court (in Missouri) did, indeed, have jurisdiction, but reasoned that under the peculiar facts of the particular case, federal law applied, and that the federal law had been misapplied by the Missouri court. p. 174. The court had no argument with the contention that the union had a duty to fairly represent all of the employees in the bargaining unit, and duty in the enforcement of the resulting bargaining agreement, but reasoned that since the claim rested exclusively upon a failure to fairly represent the plaintiff, a claim of a breach of a duty established by a federal statute, federal law applied. p. 177.

The court concluded that the preemption doctrine, perhaps best articulated in *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959), did not extend to "cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to he with the N. L. R. B." p. 179.

The court reasoned that there was no preemption where the activity regulated is only a "peripheral concern" of a Labor Management Relations Act, or activity which "touch(es) interests so deeply rooted in local feeling and responsibility" that there can be no inference of intended preemption by Congress. p. 180.

The court opined that the primary justification for the preemption doctrine is "not applicable to cases involving breach of the union's duty of fair representation." pp. 180-181. Rather, federal labor laws "seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." p. 182. Contractual remedies devised and controlled by unions and employers "may well prove unsatisfactory or unworkable for the individual grievant." p. 185. For these, and other reasons, the court apparently concluded that even if a claim rests exclusively upon a failure to afford fair representation to an individual member, the preemption doctrine does not apply. Even if the conduct may, in fact, constitute an unfair labor practice, still there is no preemption barrier to suit. p. 186.

None of the cited language of *Vaca* would appear to be useful to the Petitioner. Even that part of the Respondents' claim which may rest in a failure of fair repre-

sentation is clearly within the jurisdiction of the Idaho courts.

(2) Humphrey:

In *Humphrey,* this Court had earlier determined that even though the particular activity claimed to be the basis of the complaint was also an unfair labor practice, if the claim was for violation of some duty arising from a bargaining agreement, the claim was cognizable by both the federal and the state courts. p. 344. In the particular case, it was determined that the individual union members had not proved their claim. p. 351. Here, the Respondents have been given no opportunity to prove their claim, and the Idaho Court has ruled that they should be given that opportunity.

(3) Lockridge:

The Petitioner places considerable reliance upon this Court's decision in *Motor Coach Employees v. Lockridge,* 403 U. S. 274 (1971). They take particular comfort in the ruling of the court in *Lockridge* that it is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern as to whether or not the preemption doctrine applies. It is difficult to understand where Petitioner finds joy in this ruling. The precise conduct subject to regulation in the present case has yet to be precisely defined, and that definition is almost certainly going to be of conduct which was either not within the area intended to be regulated by Congress in the establishment of the federal labor law, or conduct subject to scrutiny by both the federal and the state courts.

In *Lockridge,* the court makes it clear that the preemption doctrine has not removed all state court regulation of union conduct. p. 291. The doctrine is there clearly said not to apply where we cannot presume that Congress intended "to intrude so deeply into areas traditionally left to local law." p. 297. Fair representation suits are reasoned to be of such a character that they generally do not "give rise to actual conflict with the operative realities of fair labor policy." p. 301. Actions to enforce collective bargaining agreements are, according to the opinion, clearly cognizable in both federal and state courts. p. 298. For this proposition the court cites *Charles Dowd Box Co. v. Courtney,* 368 U. S. 502 (1962).

The case is determined, however, not to be an action for the enforcement of a collective bargaining agreement, or an action within the areas left to the operation of state law. p. 299. The *Lockridge* claim, of course, was that the plaintiff had been improperly discharged from his employment, at the union's instigation, when he was late in the payment of union dues. p. 279.

(4) Lack of Finality: Case Below:

It is claimed by the Petitioner that the Idaho Supreme Court disposition of the case is "dispositive" as to preemption issues and thusly properly reviewable by this court at this time. Petitioner also argues that the refusal of immediate review might seriously erode federal policy. It is impossible to understand how either of these arguments can have merit.

The Idaho opinion did conclude that state courts have jurisdiction over wrongful death claims against unions,

claims which rest upon breach of duties, assumed by unions, as to safety on their members. The court did not, however, conclude whether or not these plaintiffs have a claim, nor did it decide upon what basis such a claim would rest. Until those determinations are made, the opinion can hardly be "dispositive" of either the nature or the disposition of the claims.

The Respondents believe that the Petition for Certiorari at best is premature.

In his specially concurring opinion joined by two additional Justices, Justice Bakes of the Idaho Court, after making reference to this court's decisions in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 359 U. S. 236 (1978), and *Farmer v. United Brotherhood of Carpenters,* 430 U. S. 290 (1977), recited an additional rationale for his special concurrence.

That rationale is grounded in the conclusion that in this case:

> "(T)he precise nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case. Indeed, it has not yet been determined by either the trial court or this Court that the appellants' claim in fact states a claim for relief in tort against the respondent union. . . . That issue was not briefed in this appeal and so we do not reach it." (App. 54a-55a).

It is therefore clear that, as to the remand and reversal of the Union's summary judgment, the Court below concluded that before a decision could be made as to whether federal preemption is applicable to the instant case, the "precise nature of the legal issues" must be defined and clarified. Justice Bakes is explicit in stating that it must be decided whether a claim for relief in tort can be established by the Respondents.

Given the opinion of the Court below, and the clear mandate of that decision to determine the nature of the legal issues in the instant case, it would be a waste of judicial time to determine a question that could be mooted by an Idaho trial court's decision that the Respondents' claim for relief does not sound in tort. It would be premature and untimely to decide the question of federal preemption when the Court below never reached the issue of whether the Respondents' claim is one sounding in tort or is one of breach of contract (Appendix 55a).

The underlying rationale of this Court's decision in the case of *Gospel Army v. City of Los Angeles,* 331 U. S. 543, 67 S. Ct. 1428 (1947), is applicable by analogy. In *Gospel Army,* this Court stated that where, under state law, a reversal would operate to remand a case for a new trial and that such remand would place the parties in the same position, as if the case had never been tried, this Court would not entertain the appeal as a final judgment.

In the present case, the majority of the Court below, specifically and explicitly directs the trial court to define and clarify the legal issues. This directive leaves the parties in the same position as if the summary judgment had never been granted, and allows the trial court the opportunity to rule on the nature of the Respondents' claim for relief.

This situation fits under the contours of the general rule that this Court will not review a judgment of the

highest court of a state, when that court's judgment, which reverses and remands an inferior court's judgment, directs that inferior state court to hold further proceedings consistent with the judgment of the state's highest court. Cf. *Urie v. Thompson,* 337 U. S. 163 (1949).

The subject of the Petition for Certiorari is not in the posture of "final judgment" for the reason the opinion of the Idaho Supreme Court does not fully determine the rights of the parties:

> "(S)o that nothing remained to be done by the trial court 'except the ministerial act of entering the judgment' which the appellate court . . . directed." *Gospel Army v. City of Los Angeles,* 331 U. S. 543, 546, 67 S. Ct. 1428, 1430 (1947). See, 28 U. S. C. § 1257 (1970).

Here, the Idaho trial court must determine the nature and the parameters of the legal issues raised by the Respondents in their claim for relief. Surely, this task cannot be characterized as the "ministerial act of entering . . . judgment which the appellate court . . . directed." *Id.*

The Petition for Certiorari should be denied, if not for other reasons, because the judgment of the Idaho Supreme Court is not a final judgment within the definitional standards of that term as given in the case of *Gospel Army v. City of Los Angeles,* supra.

As Justice Shepard of the Idaho Supreme Court reasoned, it is difficult to understand why a claim of wrongdoing resulting in death against a union is any different from any claim of wrongdoing resulting in death against any other entity or individual. Unions, in common with other entities, must respond to individual claims when they are lodged. They have been given no Congressional

immunity against such claims. It cannot be seen where a refusal of review in this situation would erode federal policy in any way.

(5) Duty Upon Unions:

The Petitioner argues that the Idaho decision puts in place upon unions a state duty more onerous than any federal duty. The Idaho decision places no special duty upon a union. It merely recognizes that a union may, given the proper set of circumstances, place itself in a position of duty toward its members, which upon its breach may cause the union to respond in damages.

We are cited no federal law which places any duty upon unions to look to the safety of its members, but this is not to say that no such duty may arise from the agreements, statements and actions of a union. Catastrophe is seen from the recognition of any such duty in this case. We are told that unions will no longer bargain for safety regulation if by doing so they jeopardize their financial resources. This rather sweeping indictment of labor organizations would seem totally unjustified. Respondents are unaware of any federal labor law philosophy designed to remove unions from responsibility for their torts. No federal statute or case is cited for the proposition that Congress has extended any immunity to unions. It cannot be seen that this purported risk, despite all of its dramatic appeal, is any different than the risk of any individual or entity which struggles for the safety of Idaho workers. Whether the union in fact placed itself in a position of duty, and whether it breached any such duty, remains to be determined. What the Petitioner seeks is a ruling

that it can under no circumstances become responsible for deaths which result from the failure of safety procedures. Certainly, such a determination would not be an advancement of the goals of federal labor.

(6) Conflict Between States:

The Petitioner expresses concern about a purported conflict among state courts as to whether a disposition of this type of a claim is or is not preempted by federal labor law. They argue that Idaho has determined that there is no preemption, as does Missouri in *Helton v. Hake,* 364 S. W. 2d 313 (Mo. Ct. App. 1978). They assert that New Jersey, Pennsylvania and Washington have reached a contrary conclusion. *Brooks v. N. J. Manufacturers Insurance Co.,* 405 A. 2d 466 (N. J. Sup. Ct. App. Div. 1979); *Carollo v. 40-8 Insulation, Inc.,* 381 A. 2d 990 (Pa. Sup. Ct. 1977); *Higley v. Diston,* 92 LRRM 2443 (Wash. Sup. Ct. 1976). An examination of the cases, however, reveals little in the way of a direct conflict among the authorities.

It is certainly true, as we have seen, that Idaho has ruled against preemption and has recognized that there may be a claim against a union other than one arising from the duty of fair representation under the Labor Management Relations Act (the instant case). Missouri has ruled that a claim for death proximately related to a union's failure to discharge a duty imposed upon it by a bargaining agreement is cognizable in the state courts and is not subject to the preemption doctrine (*Helton v. Hake,* supra).

New Jersey (in *Brooks v. N. J. Manufacturers Insurance Co.,* supra) distinguishes its ruling from the *Helton*

v. Hake fact situation (p. 473), and rules that summary judgment of dismissal was appropriate in the particular case when the plaintiff showed no duty owed by the union which could have been the subject of a claim arising from a breach of duty. This was the reasoning of the New Jersey court:

> "The record is devoid of any facts from which any duty owed by International to plaintiff can be spelled out." (p. 468).

The Court there reasoned that the bargaining agreement set out no "specific duties or responsibilities" of the union and concluded that it was not the function of the union committee to inspect for hazardous conditions; the safety program in that case was the sole responsibility of management. It cannot be seen from the New Jersey decision that that court rejects the preemption notions of the Idaho and Missouri courts, or that it would, if faced with the Idaho fact situation, refuse jurisdiction and rule that a viable claim was not possible.

The Pennsylvania Superior Court in *Carolla v. 40-8 Insulation, Inc.,* supra, comes much closer to grossly rejecting the responsibility of a union under the circumstances of this case, and widely applying the inability to avoid the preemption bar. It should be noted, however, that in the Pennsylvania case, there was no discernible union duty to the individual workers, other than that which might be generally inferred from the collective bargaining agreement. The Pennsylvania court (at p. 996) reasoned that to impose a duty to search out and take precautions for the safety of its members upon a union would be an intrusion into federal preempted areas. It should be

noted that no specific duty to the union's members was there discernible. The case is thus clearly distinguishable. In the present case, the claim is that the union took the safety duties upon itself and should be answerable for its failure to discharge those duties. Whether or not we agree with the *Carolla* philosophy, it is certainly one thing to say that a union need not search out and take precautions for the safety of its members upon only basic duties of fair representation, and quite another to suggest that the union need not discharge specific duties which it agrees to take as part of its solicitation of the opportunity to represent the particular miners.

The significance of the United States District Court for the District of Idaho's decision in *House v. Mine Safety Appliances Co.,* 417 F. Supp. 939 (1976), has been appropriately dealt with by the Idaho court in this case in this language:

> "The federal court relied in part upon the very trial court decision which is the subject of this appeal. We are not bound by the federal court's determination and its decision is, at best, only persuasive."

It is reasonable to conclude that the Idaho federal court decision might have been quite different had that court had the advantage of the ruling below. It apparently incorrectly anticipated the Idaho Supreme Court's doctrine in this field.

The Washington state court decision noted in the Petitioner's Brief is from a Washington Superior Court, an original jurisdiction court equivalent in status to the district court in Idaho. It cannot be particularly significant to this court that there may be a conflict in decisions

between various state courts of original jurisdiction as to the questions here presented.

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AFFIRMATIVE STATEMENTS AGAINST PREEMPTION

Respondents believe that this court has ruled against preemption in cases of this sort by its opinion, admittedly upon different facts, in *Farmer v. United Brotherhood of Carpenters,* 430 U. S. 290 (1977). Reasoning that while the Congress has given broad powers to the N.L.R.B. to interpret and enforce the L.M.R.A., thusly implying that potentially conflicting rules of law, remedy and administration cannot operate, the court concluded that it has not intended that all local regulation that touches or concerns in any way the complexity of relationships between employees, employers and unions is intended to be preempted. *Id.,* pp. 295-296.

These areas of conduct are there determined not to be preempted: (a) Activity that is "merely a peripheral concern of the L.M.R.A." *(Id.,* pp. 296-297); (b) activity that touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress has deprived the states of the power to act" *(Id.,* pp. 296-297); (c) where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes" *(Id.,* p.

297); (d) where there is an "overriding state interest" in the protection of its residents from the particular activity (*Id.*, p. 298; *Linn v. Plant Guard Workers,* 383 U. S. 53 (1966)); (e) where the state interest in the particular activity is "deeply rooted in local feeling and responsibility" *(Id.,* p. 298); (f) where there is "little risk that a state cause of action would interfere with the effective administration of national labor policy" *(Id.,* p. 298); (g) where a board would be without authority to provide the injured individuals with damages or other necessary relief *(Id.,* pp. 298-299); (h) where the state court would not be interested in directing labor policy but would be interested in awarding relief for its injured citizens *(Id.,* pp. 298-299); (i) where the claim can be adjudicated without regard to the merits of the underlying labor controversy, if any *(Id.,* pp. 299-300).

As the court reasoned, quoting from *Vaca v. Sipes, supra,* whether or not to preempt ". . . must depend upon the nature of the particular interest being asserted and the effect upon the administration of the national labor policies of concurrent judicial and administrative remedies." *Id.,* p. 301.

The court continued with the directive that ". . . inflexible application of the doctrine *(Garmon)* is to be avoided especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue influence with the federal regulatory scheme." *Id.* p. 302.

This court summarized its ruling in *Farmer* by concluding that the state had a substantial interest in protecting its citizens from the particular abuse demonstrated in that case *(Id.,* p. 302), and ". . . in light of the

discreet concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interests of the state in protecting its citizens." *Id.,* p. 304. The court finally reasoned, "on balance, we cannot conclude that Congress intended to oust state court jurisdiction over actions for tortious activity such as that alleged in this case." *Id.,* p. 305.

The Respondents believe that the questions of this case are within the "peripheral concern" area of the L.M.R.A. They certainly believe that the state has a deep-rooted feeling and responsibility in the area of the claims presented. They believe that the prosecution of this action will do no disservice to the interests promoted by the federal labor statutes. Clearly, the N.L.R.B. could not give the relief requested and desperately needed by the Respondents herein. The other exceptions to preemption considered in *Farmer* would also seem applicable. The reasoning of *Farmer* appears particularly applicable to our situation where the widows and children of the deceased miners claim recovery against a union which allegedly voluntarily undertook safety regulation activity, causing its members to believe that it was deeply engaged in that activity, and then breached the duties which it voluntarily put in place. It can scarcely be argued but that the State of Idaho has a keen interest in the protection of the widows and children of its miners, and that protection will scarcely be promoted by a ruling which would leave the widows and children without relief, except possibly the illusory hope that the N.L.R.B. might somehow find an unfair labor practice, some way reprimand the union, and possibly, remotely, hope for better practices in the future.

CONCLUSIONS

There would seem to be no substance to the Petitioner's arguments for the exercise of certiorari in this matter. The development of the case has not reached the stage where a court can be quite certain as to what the final determination of factors related to preemption will be. It cannot be seen where rejection of a preemption doctrine in this case would have any disruptive effect upon the orderly development of federal labor law. Certiorari should be denied.

Respectfully submitted,

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